Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 77-1014

IN THE

SUPREME COURT OF THE UNITED STATES

1977 Term

SURVEY ENGINEERS, INC., a Colorado corporation, Petitioner,

vs.

THE ZOLINE FOUNDATION, an Illinois corporation, and JOSEPH ZOLINE, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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vs.
THE ZOLINE FOUNDATION, an Illinois corporation, and JOSEPH ZOLINE, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

This matter has been considered once by the Colorado Court of Appeals and twice by the Colorado Supreme Court. The decision of the Court of Appeals was rendered December 31, 1974, and appears in 532 P.2d 748. The first decision of the Colorado Supreme Court was rendered March 15, 1976, and appears in 546 P.2d 1257. The second was rendered August 22, 1977, and appears in 568 P.2d 436. For copies of the opinions see Appendix "A".

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The Petitioner seeks review of the decision of the Colorado Supreme Court entered August 22, 1977. A Petition for Rehearing was timely filed in that matter and denied September 27, 1977. It is the Petitioner's contention that circumstances surrounding the rendering of that decision denied it due process of law and, accordingly, it believes that 28 U.S.C.A. §1257(3) confers on this Court jurisdiction by Writ of Certiorari to review the said decision.

QUESTION PRESENTED FOR REVIEW

The question presented for review by this matter is whether the Colorado Supreme Court denied the Petitioner due process of law by reason of the fact that the said Supreme Court purported to affirm the decision of the trial court on the basis it was supported by the record, when, in fact, the Colorado Supreme Court's review of the record, if any, was stale by almost two years at the time oral arguments were held and its decision was rendered, the record was not physically lodged in the Supreme Court at any time prior to argument and decision following remand, and at least one Justice participating in the decision could not have possibly reviewed the bulk of the record at any time.

CONSTITUTIONAL PROVISION INVOLVED IN CASE

The Constitutional provision involved in this case is that portion of the Fifth Amendment as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

The Petitioner, a land surveying firm with offices in Grand Junction, Aspen, and Boulder, Colorado, initiated this action in 1970 seeking compensation for services performed for the Respondents as a professional surveyor. Earlier, the Petitioner had initiated work on the survey project and, in 1969, completed an extensive land survey of Respondents' holdings outside Aspen, Colorado. The Respondents, contending that the charges- in the approximate amount of $11,000- were excessive, refused to pay any sums whatsoever for Petitioner's services, thereby leading to the filing of this action.

Proceedings were completed in the trial court in the Spring of 1973, and judgment for the Petitioner of approximately $6,600.00 was awarded. Appeal was taken by the Defendants to the Colorado Court of Appeals where the

Petitioner's judgment was modified by a reduction of $6,000.00. This action was taken by that tribunal upon a conclusion that the evidence presented in the trial court did not support the judgment.

Certiorari was granted by the Colorado Supreme Court and a decision was rendered thereby on March 15, 1976. The essence of that judgment was to reverse the Court of Appeals' reduction of damages as being contrary to established Colorado law and to remand the matter to the trial court for a re-award of damaged based upon a review of the record. The Colorado Supreme Court retained jurisdiction for further appeals and ordered that either party could obtain review of the trial court's award by simply requesting recertification.

Following remand the trial court requested briefs, refused the Petitioner's request for additional oral argument and took the matter under advisement. In July of 1976, the trial court's second judgment was pronounced. It refused to award any portion of the $6,000.00 worth of surveyor's fees previously stricken by the Court of Appeals.

Upon recertification, the Colorado Supreme Court set the matter for briefing and oral argument, the latter being completed July 12, 1977. Final disposition occurred August 22, 1977,

by which the Supreme Court sustained the action of the Trial court as being "supported by the record."

The disposition of the appeal by the Supreme Court, however, was conducted without benefit of the record in this cause. Following remand of this matter from the Supreme Court in March, 1976, the record, including the entire transcript, all pleadings and all exhibits had been sent back to the trial court. For reasons not entirely clear to counsel, the record was not redelivered to the Supreme Court when the matter was recertified for final review. This fact was inadvertantly discovered by counsel while in the office of the clerk of the trial court September 14, 1977, two days prior to the deadline for filing the Petitioner's Petition for Rehearing in Supreme Court. Because of this discovery, the Petition for Rehearing was hurriedly modified to include that ground as Petitioner's primary basis for a reconsideration of the Supreme Court's decision. The Petition was denied September 27, 1977.

For obvious reasons, the ground asserted herein for the granting of this Writ of Certiorari was not raised at any stage of the proceedings prior to the filing of Petitioner's Petition for Rehearing in the Colorado Supreme Court. The error was not committed until the Supreme Court's decision

was rendered in August, 1977, and was not discovered by Petitioner's counsel until immediately preceding the filing of the request for rehearing. Indeed, had not counsel forfuitously learned from the trial court clerk that virtually all of the record remained with the trial court, he would as yet not realize that this serious oversight had occurred. Thus, the Constitutional issue is being raised here for the first time-the earliest possible opportunity.

ARGUMENT

I. THE PETITIONER WAS DENIED DUE PROCESS OF LAW AS THE RESULT OF THE DETERMINATION OF ITS APPEAL WITHOUT BENEFIT OF THE RECORD.

A. The State Supreme Court purported to determine an appeal "upon the record"; it could only have done so upon a stale recollection, and with one Justice having not reviewed the record at all.

The crux of the decision of the Colorado Supreme Court appears in its August 22, 1977 judgment as follows:

> . . . The finding of the district court is supported by the record and is, therefore, affirmed.

The foregoing simply did not fairly reflect the true facts surrounding the Supreme Court's review of the evidentiary basis of Petitioner's claim.

In fact, this matter was twice before the Colorado Supreme Court. On the first occasion of briefing and argument, in the fall and winter of 1975, the complete trial court record was present. Following the Supreme Court's first decision in March, 1976, the entire record was returned to the trial court. After proceedings were completed at that level in the spring and summer of 1976, (the trial court's second judgment was pronounced July 26, 1976), the matter was recertified directly to the Supreme Court. The record in this cause, however, did not reach that tribunal. Instead, as counsel is informed, the Supreme Court requested only those portions of the record which were added during remand to the trial court. The balance of the extremely voluminous record (consisting of the transcript of a ten-day trial, over 60 exhibits, and consisting of thousands of folios) remained lodged in the trial court's clerk's office, where it was discovered long after the subsequent decision which concluded this matter in the state courts. (See the attached Affidavit of the Pitkin County, Colorado District Court Clerk, attached hereto as Appendix "B").

These circumstances were discussed by counsel and the Chief Judge of the Colorado Supreme Court after the Petitioner's Petition for Rehearing was filed therein. It was explained that the Supreme Court felt that it did not require the return of the record inasmuch as it had been supposedly completely reviewed by all of the Justices the first time the case had been before them-almost two years earlier. Nothing was discussed at that time concerning the fact that a change in the composition of the Supreme Court had occurred while the matter was under remand.

B. <u>The circumstances controlling the disposition of Petitioner's appeal denied Petitioner due process of law.</u>

The purview of the concept of due process of law includes the tenet that a litigant is entitled to a disposition of all issues affecting the parties only after a complete consideration by an adjudicating entity able to give its attention to the cause, to consider it fully and to decide it solely upon its merits. <u>Leguillou v. Davis</u>, 115 F.Supp. 392 (D.C. Virgin Islands 1953).

It is also true that where a mode of appeal is provided, the appellate courts must extend all considerations of due

process to the participants. Castle v. U.S., 399 P.2d 642 (C.A.1968).

Not only are these general considerations applicable to this action, but Colorado Appellate Rule 12(c) also provides:

> Filing of the Record. Upon receipt of the record or papers authorized to be filed in lieu of the record under the provisions of C.A.R.11(c) and (e)[1] by the clerk of the appellate court following timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record.

In this matter the specific Colorado requirements were not followed prior to the Supreme Court's decision nor, as seen in the circumstances outlined in the first portion of this Argument, were the general due process considerations observed. Apparently, it was felt by the Colorado Supreme Court that its first review of the

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[1]These provisions of the Rules pertain to temporary retention of the record in the trial court pending preparation of the completion of all appellate papers and are not relevant to the issue raised in this Petition.

record,completed in late 1975, was sufficient for a decision reached in August, 1977-almost two years later. It challenges the imagination as to how the individual Justices, who must be exposed to dozens of records and arguments a month, could possibly retain a sufficient grasp of the extremely large record in this cause to render an informed decision, particularly when the trial court returned new findings of fact, and conclusions of law following remand. The error becomes particularly significant when one contemplates that the second decision of the Supreme Court was claimed to be based entirely on a determination that the trial court's decision was supported by the record.

In addition, at least one of the Justices apparently cast his vote to sustain the trial court's judgment without the slightest understanding of of what the record contained. Justice James Carrigan was appointed to the Supreme Court in September, 1976, to replace Justice Day. Accordingly, Justice Carrigan could not have possibly have participated in the decision of this matter in any informed capacity.

While it may be submitted that his single vote could not have possibly have changed the result, nevertheless, the circumstances existing are such that the entire process ought to be

called into question. It is impossible to determine with any certainty what discussions took place prior to the arrival at a decision and what votes were cast by each Justice. It is entirely conceivable that the decision was very close and that the position urged by Justice Carrigan-or any other Justice who may have forgotten the content of the record, or simply failed to review it entirely-would have resulted in a different judgment. The taint of this grievous oversight simply cannot be measured or expunged from the process.

Perhaps the essence of the concern presented by these circumstances is best expressed by the Third Circuit Court of Appeals in National Labor Relations Board v. Botany Worsted Mills, Inc., 106 F.2d 263 (1939). Succinctly focusing upon the true test, the Court stated:

> . . . But before proceeding to a fuller exposition of that distinction we must touch upon another, also often overlooked. That is the difference between the essential characteristics of the "fair hearing" itself and the method of ascertaining the presence or absence of those essentials. In the case at bar many of the inquiries are directed to the nonessentials of due process.

> . . . It is both obvious and well settled by authority that the one who decides must hear or, in the case of written testimony, read, Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288, above cited. The United States Supreme Court does not seem to share the cynicism of a writer in the Yale Law Journal who said: ". . . No one has dared suggest that litigants may impeach the decision of judges of intermediate appellate courts on the ground that they had not read the record made before a lower court. No lawyer is naive enough to believe that judges actually read through the records in the cases before them". Feller, Prospectus For The Further Study of Federal Administrative Law, 47 Yale Law Journal 646 at 664.
>
> As the question here, then, is one of method of ascertainment only, we postpone our discussion thereof and proceed with the three other alleged denials of due process. (Emphasis added.)

Thus, the real due process guarantee is seen to be in the method of ascertainment rather than in a requirement that it be definitely shown that the arbiter actually proceeded with the full information necessary for an intelligent decision. Here it cannot be concluded that the Colorado Supreme Court even marginally observed a method

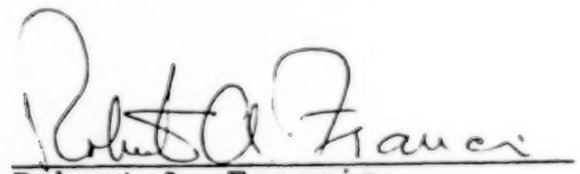
of attainment designed to supply it with that information needed to resolve this matter in a fashion consistent with due process requirments. By dispensing with a fresh recollection of the old record, it simply employed no method of attainment whatsoever.

CONCLUSION

It is submitted that the minimum that due process of law insures is a fair and complete review upon appeal of all of the matters pertinent to the positions urged by both sides. In this matter it is abundantly clear that the Colorado Supreme Court cannot legitmately come to the conclusion that "the record" supported the decision of the trial court. It is certain that any such conclusions would necessarily be based upon memories-if such were the case-dulled by the passage of almost two years, and by an inability to review the record at all on the part of at least one participating Justice. Due Process certainly requires, at a minimum, that litigants receive a complete consideration of the record in their cause, particularly when the disposition is founded upon a conclusion that the trial court's decision is supported thereby. Clearly this was not true under these circumstances.

For the reasons set forth herein, the Petitioner requests that the Court grant its Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX

APPENDIX "A"

COLORADO COURT OF APPEALS
No. 73-462

SURVEY ENGINEERS, INC., a Colorado Corporation,

Plaintiff-Appellee,

v.

THE ZOLINE FOUNDATION, an Illinois Corporation, and JOSEPH ZOLINE,

Defendants-Appellants.

Appeal from the District Court of
the County of Pitkin
Honorable Gavin D. Litwiller, Judge

DIVISION II — JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CAUSE REMANDED.

Coyte, Pierce and Smith, JJ.

Moore, Francis & Van Domelen
Robert A. Francis
Aspen, Colorado

Attorneys for Plaintiff-Appellee

Charles M. Stoddard
Glenwood Springs, Colorado

Attorney for Defendants-Appellants

Opinion by JUDGE COYTE

Survey Engineers, Inc., brought an action against the Zoline Foundation and Joseph Zoline to recover $10,878.29 which plaintiff alleged defendants owed it for services rendered in surveying defendants' land. After trial, the court found that only part of the surveying work was accurate and awarded $607.50 for that portion. After hearing plaintiff's motion for new trial, the court amended its findings to reflect that in spite of the claimed inaccuracies of the survey, the plaintiff was not negligent in performing the survey and was entitled to recover the reasonable value of the work performed and entered judgment in favor of plaintiff for an additional $6,000.

Defendants appeal, contending that the trial court erred in awarding the plaintiff compensation for the work performed, in awarding interest from the commencement of the action, and in awarding the total amount claimed for services performed. We reverse the judgment entered for the additional $6,000.

In January 1967, the defendants requested George Nelson, a registered land surveyor, who at the time, was employed by Gerard Pesman to check the survey of a boundary line between defendants' land and land of a third person. At that time, defendants were under the impression that Nelson was self-employed. Nelson performed the survey and this work was accepted by defendants.

In July of 1967, defendants requested Gerard Pesman, a licensed surveyor and

Nelson's employer, to perform a boundary line survey of defendants' property which consisted of approximately 180 acres of land. On August 18, 1969, Pesman incorporated his business as Survey Engineers, Inc., assigned all of his accounts receivable to the corporation, and continued to perform the work as an employee of the corporation. Defendants confirmed this employment by letter in which they agreed to pay Pesman his regular rates. In addition to the boundary survey, the defendants also requested that Pesman perform a fence line survey and a separate survey of a 56 acre tract. The latter two surveys were treated as part of the boundary survey by Pesman, and subsequently by Survey Engineers. There was evidence presented during the trial that defendants knew or should have known of the incorporation by 1970, and did not object to the corporation doing the work. Upon completion of the survey, plaintiff presented a statement to defendants which they refused to pay and plaintiff brought suit.

After trial, the court awarded plaintiff $607.50 as the reasonable value of its services relative to certain previous survey work, but declined to award plaintiff anything for the boundary survey work. The award of $607.50 is supported by the evidence, so it will not be disturbed on review. Linley v. Hanson, 173 Colo. 239, 477 P.2d 453.

Based on substantial evidence, the court in its initial findings found: (1) That plaintiff treated the two separate surveys as part of the boundary line survey, (2) that no evidence was presented as to how much of plaintiff's time was spent on these surveys apart from the boundary line survey nor as to the reasonable value of the time spent in doing the two separate surveys, (3) that it would be necessary in order for plaintiff to perform the survey to establish the section lines of the section of land wherein defendants' land was situated, thereby causing the north boundary of defendants' land to be inaccurately located, and (5) that the plaintiff failed to prove by a preponderance of the evidence that the west boundary line was correctly located. The court then concluded that the survey as made by plaintiff had not been substantially performed, was of no benefit to defendants and that defendants owed nothing to plaintiff for the boundary survey.

After hearing on motion for new trial, the court departed from its prior conclusion that plaintiff had breached its contract, had not substantially performed, and was not entitled to recover, and made new findings, still finding that the east 1/4 corner was not accurately located, and that the evidence was evenly balanced as to whether plaintiff had correctly located the west line of defendants' property. It then found that plaintiff had exercised due care in the performance of its duties, had not been negligent, and was entitled to recover on quantum meruit. The court awarded

plaintiff $6,000 for the reasonable value of its services.

The court erred in concluding that plaintiff was entitled to recover on its claim for quantum meruit. The modern trend is to allow recovery on a quantum meruit basis even though there is not substantial performance, the reasoning beind that when there has been a benefit bestowed upon a party, that party should pay for the benefit which he has received. Reynolds v. Armstead, 166 Colo. 372, 443 P.2d 990; Milner v. Ruthven, 116 Colo. 22, 178 P.2d 417. Here, however, there is evidence that much time was spent in making the survey, but no evidence or finding by the trial court that the time spent by plaintiff bestowed upon or resulted in any benefit to defendants. To the contrary, the court in its initial findings, found that the survey as made by plaintiff was of no benefit to defendants and that defendants owed nothing to plaintiff for the boundary survey. The evidence supports this finding. In its supplemental findings, the court still found that the east 1/4 corner is incorrectly located and the evidence does not prove that the west line is accurate. Accordingly, the entire north line of the survey is out of position, and the whole survey is thus inaccurate.

Ordinarily, if findings are supported by competent evidence, they

will not be disturbed by the reviewing court, but if erroneous principles of law are applied to the facts, as they were in this case, judgment rendered on such facts will not be upheld on review. American National Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281. Even accepting the revised findings of the trial court as true, they do not support its conclusion that the reasonable value of the services is $6,000. As to the value of the services rendered by plaintiff to defendants, the court found that time sheets were not kept in a reliable manner and that on occasions work was improperly charged and that the court was unable to determine the contract price of the survey which plaintiff and its predecessor had agreed to perform for defendants. Under these circumstances there was no factual finding which would support the conclusion that defendnats are indebted to plaintiff in the amount of $6,000 or in any amount. Any conclusion of the court as to the indebtedness of defendants to plaintiff would be based on conjecture and speculation and not on any evidence.

If we were to consider this case on the basis of substantial performance, plaintiff would again not be entitled to recover. The burden of proof is on plaintiff to prove substantial performance, Morris v. Hokosona, 26 Colo. App. 251, 143 P. 826, and, on

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will not be disturbed by the reviewing court, but if erroneous principles of law are applied to the facts, as they were in this case, judgment rendered on such facts will not be upheld on review. American National Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281. Even accepting the revised findings of the trial court as true, they do not support its conclusion that the reasonable value of the services is $6,000. As to the value of the services rendered by plaintiff to defendants, the court found that time sheets were not kept in a reliable manner and that on occasions work was improperly charged and that the court was unable to determine the contract price of the survey which plaintiff and its predecessor had agreed to perform for defendants. Under these circumstances there was no factual finding which would support the conclusion that defendnats are indebted to plaintiff in the amount of $6,000 or in any amount. Any conclusion of the court as to the indebtedness of defendants to plaintiff would be based on conjecture and speculation and not on any evidence.

If we were to consider this case on the basis of substantial performance, plaintiff would again not be entitled to recover. The burden of proof is on plaintiff to prove substantial performance, Morris v. Hokosona, 26 Colo. App. 251, 143 P. 826, and, on

No. C-668

SURVEY ENGINEERS, INC., a Colorado corporation,

Petitioner,

v.

THE ZOLINE FOUNDATION, an Illinois corporation, and JOSEPH ZOLINE,

Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND REMANDED WITH DIRECTIONS

Moore, Francis, & Van Domelen, P.C.
Robert A. Francis,
Attorneys for Petitioner,

Charles M. Stoddard,
Attorney for Respondents.

MR. CHIEF JUSTICE PRINGLE delivered the opinion of the Court.

Survey Engineers, Inc., the petitioner, brought an action against the Zoline Foundation and Joseph Zoline, the respondents, to recover $10,878.29 which the respondents allegedly owed the petitioner for services rendered in surveying the respondents' land. The trial court entered judgment for the petitioner in the amount of $607.50, and later amended its judgment and granted recovery for an additional $6,000. The Colorado

Court of Appeals reversed that part of the judgment in the amount of $6,000 and affirmed the judgment for $607.50. Survey Engineers, Inc. v. Zoline Foundation, 35 Colo. App. 186, 532 P.2d 748 (1974). We granted certiorari and now reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings.

I.

In January, 1967, the respondents requested George Nelson, a registered land surveyor and an employee of Gerard Pesman, to perform certain survey services. At that time the petitioner was not yet incorporated. Later, however, Mr. Pesman incorporated his survey business and provided services to the respondents in that capacity. Pesman also assigned all of his accounts receivable to the corporation. The trial court determined that the corporation was the proper party and entitled to pursue this action. This ruling was upheld by the court of appeals and is not challenged in this court.

Following the respondents' request in 1967, the petitioner embarked upon several survey projects, the first of which was the verification of an earlier survey. Following trial the petitioner was awarded the reasonable value of this work in the amount of $607.50. That judgment is likewise not challenged here.

The second project was a perimeter or boundary survey, for which the petitioner submitted a statement in the amount of $10,878. The trial court, in its initial findings, found that the petitioner had incorrectly located the east quarter corner of the respondents' land thereby causing the north boundary to be inaccurately located. The court then concluded that the survey had not been substantially performed and was of no benefit to the respondent; therefore, the court held, the respondents owed nothing to the petitioner.

The trial court, however, subsequently vacated its findings of fact and conclusions of law. In the new findings, the court found, as it did before, that the east quarter corner was incorrectly located. But, the court found that the petitioner had not been negligent, had exercised due care in the performance of its duties, and had thus completed the contract. The trial court could not determine the contract price and granted a quantum meruit recovery for the petitioner in the amount of $6,000.

II.

In reversing the trial court judgment, the court of appeals relied on the initial findings by the trial court. This was clearly erroneous since the initial findings of fact and conclusions of law had been expressly vacated by the terms of the amended judgment. See Green v. Jones, 134 Colo. 208, 304 P.2d 901 (1956).

Further, the court of appeals held that the evidence was insufficient to support a quantum meruit recovery. It is well settled that where a promisee has performed services, but cannot enforce an express contract, he may nevertheless recover so much as his efforts have benefitted the promisor. 5A A. Corbin Contracts, §1122 (1964); Cf. Reynolds v. Armstead, 166 Colo. 372, 443 P.2d 990 (1968). It is required in the instant case, therefore, that a determination be made as to the benefit, if any, recieved by the respondents from the services rendered by the petitioner. The trial court's amended judgment is ambiguous in this regard. The trial court in the amended judgment referred to the "reasonable value of (the petitioner's) work." However, there may be a difference between the value to the petitioner of services performed and the benefit received by the respondents. See 5A A. Corbin Contracts §1124 (1964). Consequently, we reverse the judgment of the court of appeals and remand to the trial court for a determination based on the record regarding what benefit, if any, the respondents received from the inaccurate survey, the value of that benefit, and for entry of judgment based on those findings.

However, in order to eliminate the necessity for another appeal and its attendant delays, this court retains jurisdiction, subject to the remand, and the trial court shall, if either party

requests, within 30 days after the entry of the judgment, recertify the record to this court for final disposition. If no such request is made, the trial court shall advise this court of such fact, and the appeal will be dismissed.

The judgment of the court of appeals is reversed and the action is remanded to the trial court for proceedings consistent with the views and directions expressed in this opinion.

(Colorado Supreme Court, March 15, 1976)

IN THE SUPREME COURT
OF
COLORADO
No. C-668

SURVEY ENGINEERS, INC., a Colorado corporation,
Plaintiff-Appellant (formerly Petitioner),
v.
THE ZOLINE FOUNDATION, an Illinois corporation, and JOSEPH ZOLINE,
Defendants-Appellees (formerly Respondents).

Appeal From the District Court
of Pitkin County
Honorable Gavin D. Litwiller, Judge

EN BANC

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS

Robert A. Francis,
Attorney for Petitioner-Appellant (sic.)
(formerly Petitioner).

Charles M. Stoddard,
Attorney for Defendants-Appellees
(formerly Respondents).

PER CURIAM

We previously reviewed the issues in this case in Survey Engineers v. Zoline Foundation, ___ Colo. ___, 546 P.2d 1257 (1976). Our opinion is directed:

> "(R)emand to the trial court for a determination based on the record regarding what benefit, if any, the respondents (Zoline Foundation) received from the inaccurate survey, the value of that benefit, and for entry of judgment based on those findings." (Emphasis in original.)

On remand, the district court concluded that the survey caused a benefit of $607.50 and awarded interest from May 8, 1973, to The Zoline Foundation. The finding of the district court is supported by the record and is, therefore, affirmed.

The district court also decreed that the defendants be awarded judgment for their costs expended. The district court's determination and assessment of costs against the plaintiff was error and is, therefore, vacated and set aside. Section 13-16-105, C.R.S. 1973. Each party to pay its own costs.

Accordingly, the judgment is affirmed in part and reversed in part and cause remanded with directions.

(Colorado Supreme Court, August 22, 1977)

APPENDIX "B"

STATE OF COLORADO)
) ss.
COUNTY OF PITKIN)

AFFIDAVIT

Shirley W. Dills, after first being duly sworn, deposes and says:

1. That I am the Clerk of the Pitkin County District Court of Pitkin County, Colorado.

2. That my responsibilities as said District Court Clerk have included supervision over this matter while this matter was within the jurisdiction of said Court.

3. That following the decision of the Colorado Supreme Court on March 15, 1976, the entire record in this cause was returned to the Pitkin County District Court by said Supreme Court.

4. That all of the files and records in this matter were retained by the Pitkin County District Court during the period of remand.

5. That following the decision of the Pitkin County District Court in this matter of July 26, 1977, counsel for Survey Engineers, Inc., the plaintiff in the original action, and the Petitioner herein, requested recertification of this matter to the Colorado Supreme Court.

6. That following the request for recertification the Colorado Supreme Court requested of the Pitkin County Court administrator various portions of the record in this cause, which were sent to the said Supreme Court on October 15, 1976, to-wit:

(a) The briefs of both parties upon remand.
(b) Plaintiff's motion for oral argument upon remand and Defendants' objection thereto.
(c) The trial court's Order denying oral argument.
(d) The trial court's Findings of Fact, Conclusions of Law and Judgment Following Remand, and Opinion, dated July 26, 1976.
(e) Petitioner's Notice of Recertification of the Appeal.
(f) Defendants' proposed Bill of Costs and Plaintiff's Objection to the taxation thereof.
(g) Trial court's Order relating to hearing on costs and the taxing of costs.

7. That except for the foregoing listed items, the balance of the record in this cause was retained in my office and remains therein at the present time. The portions of the record which so remain in my office include the entire trial transcript, all of the pre-trial pleadings, and other documents, all exhibits received into evidence, and all documents pertaining to post-trial procedures prior to remand.

8. That I am unaware as to the precise reasons why the bulk of the record remained in my office, but I am certain that no request therefor was ever made of me by the Colorado Supreme Court.

9. Further affiant saith not.

Shirley W. Dills
Shirley W. Dills

Subscribed and sworn to before me this 19th day of December, 1977, by Shirley W. Dills.

My commission expires: 8-8-78

Witness my hand and official seal.

Sonya J Fair
Notary Public

PROOF OF SERVICE

I hereby certify that I have served the foregoing Petition for a Writ of Certiorari upon all opposing counsel this 20th day of December, 1977, by mailing three (3) copies thereof, first-class postage prepaid, addressed as follows:

Charles M. Stoddard, Esq.
Attorney for Respondents
Post Office Box 697
Glenwood Springs, Colorado
81601

Shirley W. Dills